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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TYLER BRENNEISE, et al., Plaintiffs, vs. SAN DIEGO UNIFIED SCHOOL DISTRICT Defendant.	Case No.: 08cv28 WQH (WMc); 08cv39 WQH (WMc) (CORRECTED) OPPOSITION TO MOTION TO DISMISS AND/OR STRIKE COUNTERCLAIMS AND FOR SANCTIONS Date: September 8, 2008 Time: 9:00 a.m. Courtroom: 4 No Oral Argument Unless Requested by Court HON. WILLIAM Q. HAYES

I. THE BRENNEISES HAVE PROPERLY ALLEGED A VIOLATION FOR THE 2006-2007 AND 2007-2008 SCHOOL YEARS AND NO FURTHER

EXHAUSTION IS REQUIRED WITH RESPECT TO THE FIRST AND SECOND COUNTERCLAIMS[1]

A. The Brenneises Have Already Obtained All Educational Remedies Available Under the IDEA With Respect to the Violations Alleged in the First Counterclaim

Student's First Counterclaim is for failing to provide for G-Tube feedings in his IEPs for the 2006-2007 and 2007-2008 school years. The IEPs at issue in the administrative hearing were the August 2006 IEP and the December 4, 2006 IEP, which governed the 2006-2007 school year. As SDUSD states, the December 4, 2006 IEP extended "by its own terms" until December 3, 2007, which is halfway through the 2007-2008 school year. Because there was no new agreed-upon IEP after that date, the December 4, 2006 IEP continued to be the operative IEP for the balance of the 2007-2008 school year.

Student alleged these violations in the administrative proceeding and received all of the educational remedies available to him under the IDEA for these violations. Thus, the Brenneises have clearly exhausted their administrative remedies with respect to the failure to provide for G-Tube feedings in these IEPs during the 2006-2007 and 2007-2008 school years, as alleged in the First Counterclaim.

Student's First Counterclaim seeks additional remedies beyond those obtained in the administrative proceeding in the form of damages for the educational injury, hedonic injury and emotional distress suffered by Student as a result of the fact that the failure to provide the G-Tube feedings deprived Student of the benefit of being schooled in a public school facility with his peers in the same manner as non-disabled students are educated. The First Counterclaim also seeks damages for Student's parents including "time and expense his parents were forced to incur to educate Student in his home, lost wages, lost

[1] SDUSD does not assert a failure to exhaust with respect to the Third Counterclaim.

educational opportunities for Student's mother, expenses incurred in connection with relocating Student to Minnetonka, Minnesota, and emotional distress," which were not awarded by the hearing officer because the IDEA does not provide for the award of damages. Having obtained all of the educational remedies for these violations in the administrative hearing, no further exhaustion is required for the Brenneises to seek money damages not available under the IDEA.

B. There is No Exhaustion Requirement with Respect to the Allegations in the Second Counterclaim, But Even If There Were, Further Efforts to Exhaust Would be Futile

1. SDUSD Was legally obligated to immediately implement the remedy ordered in the hearing office decision

The Second Counterclaim is premised on SDUSD's failure to comply with the order in the administrative decision, which was issued on October 3, 2007. In that decision, the hearing officer held that Student was correct in claiming that SDUSD had denied Student a free appropriate public education ("FAPE") by failing and refusing to provide for appropriate related health care services in either his August 2006 IEP or his December 4, 2006 IEP, to address his need for G-Tube feedings. As a result, Student was not able to attend school safely and access his education, which resulted in a denial of FAPE during the entire 2006-2007 school year, through the date of the decision in October 2007, which is part of the 2007-2008 school year.

As a remedy, the hearing officer ordered that the placement in the Student's December 4, 2006 IEP be modified to include the necessary G-Tube feeding services, as requested by the Parents. Under the IDEA, if a hearing officer "agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents" for purposes of stay put. 34 C.F.R. 518(d). *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354, 358 (S.D. N.Y. 2000) ("once the parents receive an administrative decision in their favor, the current educational placement changes in accordance with that decision").

As the Ninth Circuit squarely held in *Clovis Unified School Dist. v. California Office of Administrative Hearings*, 903 F.2d 635, 641 (9th Cir. Cal. 1990), a school district is obligated to immediately implement a hearing office order, even if it appeals that order, and even if the order is ultimately reversed on appeal. Thus, SDUSD was not free to cavalierly ignore the order issued by the hearing officer that it immediately begin providing Student with the required G-Tube feeding services just because it filed an appeal of that order. If SDUSD wished to be relieved of its obligation to comply with the hearing office decision, it was obligated to seek an injunction relieving it of that obligation under section 1415(i)(2)(C)(iii) of the IDEA. *Draper v. Atlanta Indep. Sch. Sys.*, 2006 U.S. Dist. LEXIS 40964 (N.D. Ga. June 19, 2006); *Wagner v. Bd. of Educ.*, 335 F.3d 297, 302 (4th Cir. Md. 2003). Having failed to do so, it was legally obligated to comply with the order, despite its appeal and despite the outcome of that appeal.

2. There is No Exhaustion Requirement With Respect to a Claim for Failure to Implement a Hearing Office Decision

The exhaustion requirement in the IDEA provides that before seeking relief in a civil rights action, a party must first exhaust the administrative procedures identified in section 1415 – i.e. participate in an administrative due process hearing – "to the same extent as would be required had the action been brought under [section 1415]." In *Wyner v. Manhattan Beach Unified Sch. Dist.*, 223 F.3d 1026, 1030 (9th Cir. Cal. 2000), the Ninth Circuit held that the administrative hearing office does not have jurisdiction to enforce its own orders. Thus, it is not possible to adjudicate a failure to comply with an hearing office order under the administrative procedures in section 1415. Accordingly, there is no exhaustion requirement for a civil rights claim premised on failure to implement a hearing office decision.

Moreover, even though not required to obtain educational remedies under the IDEA for SDUSD's failure to comply with the order before filing their Second Counterclaim, the Brenneises made an effort to do so by including the IDEA claim in their First Amended Complaint. However, this court granted SDUSD's motion to dismiss that claim on the grounds that it did not have jurisdiction to entertain a complaint for failure to comply with a hearing office decision that is not final. Thus, the Brenneises have made every effort to obtain whatever remedies they could under the IDEA before filing this claim, and any further efforts to exhaust would be futile.

3. The Court's Dismissal of the Third Claim for Relief Does Not Affect the Viability of the Second Counterclaim

SDUSD's assertion that the Brenneises' Second Counterclaim is somehow barred under "law of the case" is spurious. First, the basis for the court's dismissal of the Third Claim was that "[t]he IDEA grants the Court jurisdiction to consider a challenge to an adverse decision rendered pursuant to an IDEA due process hearing . . . [or] a request to enforce an unappealed decision rendered pursuant to an IDEA due process hearing." June 23, 2008 Order at 14:25-27. This court concluded that "the third claim does not fit within either of these categories" because the Brenneises appealed "some aspects" of the hearing office decision, [2] and the court's ruling on those issues "may impact the enforceability of the December 4, 2006 IEP." Id at 14:28-15:8.

By contrast, there is original jurisdiction for this court to hear a claim under section 504 and the ADA. Thus, unlike a claim under the IDEA, there is no need either to be a "party aggrieved," or for the decision to be final, in order for this court to assert jurisdiction over such a claim. Because the IDEA claim was dismissed for jurisdictional

[2] The Brenneises, who did not appeal any aspect of that portion of the order that they were seeking to enforce, continue to disagree with this rationale, as it puts the parents in the position of having to make the Hobson's choice foregoing an appeal of issues on which they did not prevail in order to enforce those portions of an order on which they did prevail. Moreover, as discussed in section I.B.1, the relief ordered by the hearing office became Student's stay put placement as soon as it was ordered, and SDUSD was obligated to comply with that order unless and until a ruling on appeal relieves them of that obligation.

reasons that do not apply to the civil rights claim, that dismissal can have no impact on the viability of the Second Counterclaim, which sounds under section 504 and the ADA.

Moreover, the claims are fundamentally different in that they involve different rights. *Amaro v. Continental Can Co.*, 724 F.2d 747, 749 (9th Cir. Cal. 1984) ("A factor to be considered in determining whether the same claim is involved is 'whether the two suits involve infringement of the same right.'") If not, then a violation of the IDEA would automatically be a violation of section 504 and the ADA, which the Ninth Circuit has held is not the case. *Mark H. v. Lemahieu,* 513 F.3d 992 (9th Circ. 2008).[3]

II. THE COUNTERCLAIMS ALLEGE FACTS SUFFICIENT TO ESTABLISH A VIOLATION OF SECTION 504 AND THE ADA

A. The Counterclaims Allege More Than a Mere Violation of the IDEA

The IDEA claims alleged in the administrative proceeding dealt only with the failure to include the G-Tube feedings in Student's IEP, and the educational injury that he suffered as a result of the failure to do so. Similarly, the IDEA claim for failing to implement the hearing office decision also dealt with the educational injury Student suffered as a result. The section 504 and ADA claims allege something more: that by virtue of the failure to properly provide for the G-Tube feedings, Student was not merely denied educational benefit in violation of the IDEA, but he was completely excluded from being able to attend a public school facility to obtain his education.

This is not a mere disagreement over educational approach; it is not akin to an "incorrect evaluation, or substantively faulty individualized education plan;" nor is it a disagreement among experts over the "needs of a handicapped child." *See Sellers v. Sch. Bd.*, 141 F.3d 524, 529 (4th Cir. 2002). Rather, the claim is that by failing and refusing

[3] Similarly, SDUSD's citation of cases dealing with claim preclusion have no application here, where the IDEA specifically authorizes a party to pursue a subsequent action under the civil rights laws for which there are also IDEA remedies available, after first obtaining those remedies, to the extent possible, under the IDEA.

to accommodate his disability by properly providing for his medically necessary G-Tube feedings, it was physically unsafe for Student to attend school, forcing him to remain at home. As a result, he was excluded from participation in the public school environment and the company of non-disabled students, solely on account of his disability. In other words, separate but equal is not acceptable under section 504 and the ADA.

Much less is separate and **unequal** acceptable, as alleged in the Third Counterclaim, which alleges that SDUSD failed to provide Student instruction from a qualified teacher while he was forced to remain at home as result of its failure to accommodate his disability. All students who attend public school are entitled to receive instruction from qualified, credentialed teachers. Calif. Ed. Code § 44830. Moreover, California law requires that any student who requires home instruction due to health reasons is also entitled to be instructed by a qualified, credentialed teacher. Calif. Ed. Code § 44865. The Third Counterclaim alleges that SDUSD failed and refused to provide Student with a qualified, credentialed teacher while he was forced to remain home due to his need for properly administered G-Tube feedings that SDUSD refused to provide. Again, this is not merely a disagreement about educational philosophy; this is a denial of the benefit of instruction by a qualified, credentialed teacher to which other students are entitled, solely because of Student's disability.

SDUSD makes much of the fact that the complaint does not identify a specific regulation that was allegedly violated. However, the conduct complained of in the complaint does not rely on a regulation to support the claim; the conduct alleged violates the express prohibition in section 504 that "no otherwise qualified individual with a disability . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program . . . ." Nevertheless, the conduct complained of clearly would also violate 34 C.F.R. § 104.33(a) and (b), which provides that "regardless of the nature or severity of the person's handicap," that person is entitled to a "free appropriate public education" that includes "the provision of regular or special education and related aids and services" designed to meet the educational needs of the handicapped person "as adequately as the needs of nonhandicapped persons are met." As discussed, by failing to provide the necessary G-Tube feedings required to permit Student to attend school safely, and failing to provide for a qualified teacher to provide him instruction while he was forced to remain at home, SDUSD did not meet Student's needs "as adequately" as the needs of nonhandicapped students are met. It is obvious from the way the allegations are plead that the claims allege violations governed by this regulation as well as the express terms of section 504 and the ADA. Requiring the Brenneises to file a new complaint that makes specific reference to that regulation would be unnecessarily formalistic.

III. FILING THE CIVIL RIGHTS CLAIMS AS COUNTERCLAIMS WAS NOT ONLY LEGALLY PERMISSIBLE, IT WAS THE MOST PRUDENT COURSE OF ACTION

The civil rights claims in this case could have been filed as additional claims in the Brenneises appeal, as counterclaims in SDUSD's appeal,[4] or as an entirely separate lawsuit. At the time the First Amended Complaint was filed by the Brenneises, SDUSD had a separate complaint pending against the Brenneises. The two cases were consolidated when the court ruled on the motions to dismiss filed by the parties in the two respective actions, and thus neither party had yet filed their answers to the other's complaint. The Brenneises could have filed a motion to amend their complaint, which would unquestionably have been granted, given the very early stage of this case and SDUSD's failure to show any prejudice by the filing of these counterclaims. Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178 (1962). However, this would have required additional delay and another motion on which this court would have had to rule. The

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[4] *Turner & Boisseau Chartered v. Nationwide Mutual Ins. Co.*, 175 F.R.D. 686 (D. Kan. 1997), relied on by SDUSD, is nothing like the present case, as that case involved an attempt to file a counter claim in reply to a counterclaim, a procedure not provided for under the Federal Rules of Civil Procedure. By contrast, Federal Rule of Civil Procedure Rule 7(a) specifically provides for the filing of a counterclaim in an answer.

Brenneises could have filed a separate lawsuit altogether, then moved to consolidate, but this would have involved a separate filing fee as well as the expense of service as well as additional delay. Filing the civil rights claims as counterclaims was thus the most cost-effective and expeditious way of asserting them.

As to SDUSD's argument that the Brenneises should be sanctioned for unduly multiplying the proceedings, this appears to be projection on the part of SDUSD's counsel. It is SDUSD that is unduly complicating this proceeding, first by asserting a claim for attorneys' fees that its counsel knows is frivolous,[5] and most recently by filing a notice of appeal in the Ninth Circuit of this court's decision not to dismiss the Brenneises' claim for attorneys' fees in connection with the CDE compliance proceedings before this court has ruled on SDUSD's motion to certify the issue for interlocutory appeal. This has resulted in the Brenneises' incurring additional fees to move to dismiss the appeal, and a notice by the Ninth Circuit – which crossed in the mail with the Brenneisses' motion to dismiss – to show cause why the appeal should not be dismissed as it has not yet been certified. Thus, if anyone is deserving of sanctions under section 1227, it is the counsel for SDUSD.

Dated: August 25, 2008

Respectfully submitted,

Wyner & Tiffany
ATTORNEYS AT LAW

/S/ Marcy J.K. Tiffany
Attorneys for Defendants

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[5] The fact that SDUSD's attorneys were able to plead this claim in a sufficiently artful fashion so as to avoid a motion to dismiss does not make it any less frivolous in nature, as will clearly be established as this litigation proceeds.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of 18 and that I am not a party to this action. On August 25, 2008, I served this OPPOSITION TO MOTION TO DISMISS AND/OR STRIKE COUNTERCLAIMS AND FOR SANCTIONS on the San Diego Unified School District by serving their counsel of record electronically, having verified on the court's CM/ECF website that such counsel is currently on the list to receive emails for this case, and that there are no attorneys on the manual notice list.

Dated: August 25, 2008 /S/ Marcy J.K. Tiffany